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No. 60115-6-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

MORGAN STANLEY DW INC., and KIMBERLY ANNE BLINDHEIM,

Appellants,

v.

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,

Respondents.

REPLY BRIEF OF APPELLANTS

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MISCELLANEOUS

A. SUMMARY OF ARGUMENT IN REPLY

After considering numerous documents other than the arbitration award itself, the trial court substituted its legal judgment for that of the arbitration panel and nullified an otherwise sound arbitration award that is clearly subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The trial court erred by ignoring the FAA's exclusive and highly deferential standard of review of arbitration awards and by instead applying a discredited standard of review under Washington law, "legal error on the face of the award," which is preempted by the FAA. The Washington standard undermines the twin polices underlying that supreme federal statute: enforcement of arbitration agreements according to their terms and quick and efficient enforcement of arbitration awards.

While the parties spend many pages in their briefs dealing with federal preemption, the arbitration award in this case is entitled to confirmation regardless of whether federal or state law grounds for vacatur are applied. While plaintiffs ("the Brooms") contend that arbitrations are not "actions" or "suits" under Washington law and that statutes of limitation simply can not be applied in arbitration, the two cases upon which they rely are limited to their unique facts and do not hold that arbitrators are foreclosed from applying statutes of limitation.[1] Rather, the

[1]Plaintiffs make this argument while seeking attorney fees in arbitration based on Washington statutes which allow attorney fees only in "actions" or "suits." CP 27, 30.

law in Washington is that arbitration is judicial in nature and that arbitrations can be considered "actions" within the meaning of Washington statutes. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 41, 42 P.3d 1265 (2002). Thus, the blanket "per se" rule applied by the trial court, that statutes of limitation may never be applied by arbitrators in Washington, does not exist.

Instead, by agreeing to submit their dispute to final and binding arbitration, the parties agreed to give the arbitration panel authority to decide all legal and factual issues, including the proper application of statutes of limitation. In the absence of direct authority in Washington prohibiting arbitrators from applying statutes of limitation to claims in arbitration, the arbitration panel's decision that, under the circumstances of this case, plaintiff's claims were time-barred was not legally erroneous on its face and should have been confirmed by the trial court.

Arbitration awards are entitled to enormous deference by the courts. Only in the most extraordinary circumstances, carefully delineated by statutes, are courts privileged to substitute their opinions for those of an arbitrator. These circumstances are not present here and the arbitration award was entitled to confirmation under whichever legal standard for judicial review is applied.

B. REPLY TO COUNTERSTATEMENT OF THE CASE

The Brooms' counterstatement of the case contains several

inaccuracies. First, the Brooms attempt to convince this court that Morgan Stanley DW, Inc. and Kimberly Anne Blindheim (collectively, "MSDW") submitted this case to the Superior Court solely under Washington law. Brief of Respondents, p. 2 ("Resp. Br."). However, MSDW opposed vacatur of the award under both the FAA and Washington's Revised Uniform Arbitration Act, RCW 7.04A.010 *et seq.* ("RUAA"). CP 223. MSDW also filed a separate motion to confirm the arbitration award under section 9 of the FAA, 9 U.S.C. § 9. CP 532.

Despite the fact that MSDW raised the FAA before the trial court, the Brooms contend that MSDW "said nothing about the possibility that jurisdiction should properly lie under the FAA***." Resp. Br., p. 6. The Brooms contend that MSDW's failure to remove this matter to federal court based on the FAA constitutes waiver and prevents MSDW from invoking the FAA on appeal. Resp. Br., pp. 5-6. These contentions are specious because the FAA does not provide an independent basis for subject-matter jurisdiction. *Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983). MSDW could not have based federal court removal jurisdiction, or contested state court jurisdiction, based upon the FAA, and there was no diversity of jurisdiction to otherwise justify removal on that independent basis.

The remaining portions of the Brooms' counterstatement contain a description of pleadings in which MSDW addressed Washington

arbitration law. Resp. Br., pp. 6-11. But the Brooms nowhere explain why MSDW should be found to have waived reliance on the FAA, which it clearly raised below, merely because it opposed the motion to vacate by reference to the very state statute that the Brooms invoked in their pleadings, the RUAA. And the Brooms ignore the fact that the Commissioner previously rejected identical arguments regarding waiver of the FAA and ruled that the FAA applied to this case. *Commissioner's Ruling*, September 24, 2007, p. 3 ("Comm. Ruling").

The Brooms also attempt to convince this Court that the panel was conflicted in its ruling that certain of their claims were barred by applicable statutes of limitation. Resp. Br., p. 4. However, the panel unanimously granted MSDW's motion to dismiss on statutes of limitations ground and unanimously denied the Brooms' motion to reconsider that ruling. CP 149-52, 207. The two-to-one split referenced by the Brooms concerned dismissal of their Washington Consumer Protection Act claim on substantive grounds, an issue that was not part of the Brooms' motion to vacate in the trial court and which is not raised in this Court. CP 9-16.

C. ARGUMENT IN REPLY

The Brooms conceded in arbitration that "the Federal Arbitration Act controls NASD arbitrations." CP 162. But now they contend that the FAA has no application or that, if it did apply, MSDW waived reliance upon it. Importantly, in making these arguments, the Brooms do not

contest that the FAA prohibits judicial review of an arbitration award for legal error or that MSDW would prevail if the FAA standard applied. Contrary to the Broom's arguments, MSDW did not waive reliance on the FAA and the FAA preempts Washington's outdated standard for vacatur, "legal error on the face of the award," that the Brooms erroneously claim applies in this case. However, even if this Court were to rule that Washington law permits review for mere errors of law on the face of the award and that this standard of review is not preempted by the FAA's more deferential standard, MSDW would still prevail because there was no error on the face of the arbitration panel's award in this case.[2]

1. MSDW Properly Relied on the FAA Below

While conceding that MSDW raised the FAA in its initial response to their motion to vacate and also filed a counterclaim seeking confirmation under the FAA, the Brooms persist in arguing that MSDW waived its right to rely on the FAA on appeal. Resp, Br., pp. 6-8. In so doing, the Brooms make nearly identical arguments as they did before the Commissioner.[3]

Yet, the Commissioner rejected the Brooms' waiver argument

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[2]While it is tempting to jump to the merits of the arbitration award because it is clear that no error is apparent on its face and because a decision in that regard makes a decision on preemption unnecessary, due regard for the principle that federal law does not permit review of the arbitrator's decision for legal error requires that the preemption argument proceed first.

[3]Compare Resp. Brief, pp. 9-10, 12-15, with Respondent Brooms' Combined Reply in Support of Motion to Dismiss and Memorandum in Opposition to Motion for

regarding the FAA when he denied their motion to dismiss this appeal. In the face of the Brooms' argument that MSDW had relied exclusively on state law below, the Commissioner ruled that the FAA applied and that the superior court's order vacating the arbitration award was appealable as of right under the FAA. Comm. Ruling, pp. 3-4.

The Brooms failed to move to modify the Commissioner's ruling. As such, they can not relitigate the same waiver arguments made before the Commissioner. *See, e.g., In re Det. of Broer*, 93 Wn. App. 852, 857, 957 P.2d 281 (1998), *aff'd* 2005 Wash. App. LEXIS 688 (2005) (where aggrieved party fails to seek modification of a commissioner's ruling under RAP 17.7, the ruling becomes final).

However, even if the Court were to give the Brooms a "second bite" at waiver, their contention should be rejected. First, there is no waiver because MSDW raised the FAA both defensively in response to the Brooms' motion to vacate and affirmatively in connection with its counterclaim for confirmation. The fact that MSDW concurrently defended based on its contention that the RUAA's standards for judicial review were, in essence, as narrow as the FAA standards does not constitute a waiver of its right to rely on the FAA. CP 515, 529.[4]

Discretionary Review, pp. 2-4, 6-8.

[4]That MSDW might have raised its contentions more thoroughly is of no moment where the trial court was, in fact, afforded an opportunity to apply the statute. *See, e.g., Bennett v. Hardy*, 113 Wn. 2d 912, 917-18, 784 P.2d 1258 (1990) ("Plaintiffs may have framed

Second, even if this Court were to rule that the FAA was not adequately raised, RAP 2.5(a) and a judicially created exception to the normal preservation requirement excuse any such failure. RAP 2.5(a) permits a party to raise for the first time on appeal the failure of another party to establish facts upon which relief can be granted. *See also Washington Appellate Practice Deskbook*, Wash. State Bar Assoc. 3d ed. 2005), § 17.5(1) ("[w]hen a statute or court rule determines the facts upon which relief can be granted the appellate court may consider the statute for the first time on appeal"). Here, the Brooms have not established a claim for relief because "error on the face of the award" is an insufficient basis for vacatur under the FAA.

Washington's jurisprudence on preservation also supports application of the FAA in this case. Thus, this Court reviews issues, even if raised for the first time on appeal, which involve application of a statute or matters of fundamental justice. *See* 2A Karl B. Tegland, *Washington Practice: Rules Practice RAP 2.5* (6th ed. 2004). Under the doctrine announced in *Osborn v. Public Hosp. Dist. 1*, 80 Wn.2d 201, 206, 492 P.2d 1025 (1972), the court may consider any statute applicable to the substantive issues before the trial court, even though not cited to the trial

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their argument more clearly at this stage, but so long as they advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5(a) is served and the issue is properly before this court."); *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992) (purpose of

court. *See also Bennett,* 113 Wn.2d at 918. In the case at hand, the FAA is pertinent to the issues raised and developed below. Just as the Commissioner rejected the Brooms' waiver argument in favor of application of the FAA, this Court should also consider MSDW's contentions under the FAA.

Cases cited to the contrary by the Brooms are inapposite. For example, in *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), the trial court's grant of summary judgment was at issue. On review following the Court of Appeals' reversal, the Washington Supreme Court merely held that it would confine its review to the statutory grounds raised and preserved by the moving party in its motion to the trial court. *Id.* at 852-53. Other cases cited by the Brooms involve cases where the appellant completely failed to present the issue raised on appeal to the trial court. *See, e.g., O'Brien v. Griffiths & Sprague Stevedoring Co.*, 116 Wn. 302, 303, 199 P. 291 (1921) (issue raised for the first time at oral argument on appeal). In contrast, MSDW clearly raised application of the FAA here, both in defense to the Brooms' claim for vacatur and in support of its own counterclaim for confirmation.

2. If State Law Allows Legal Error Review, It Is Preempted by the FAA

While contending that it was entitled to confirmation under section

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RAP 2.5(a) is met where trial court was made aware of statute).

9 of the FAA, MSDW also argued that it was entitled to confirmation under the RUAA and that the Brooms were not entitled to vacatur under that statute. CP 511, 532. MSDW contended that the RUAA's standards for vacatur were, in essence, as narrow as the FAA standards. CP 515-17. Under these circumstances, it did not matter whether federal or state law applied because the result was the same, confirmation of the award.

The preemption issue arose only because the trial court held, under an antiquated legal standard, that state law permits judicial intrusion into the arbitration process to an extent not permitted by the FAA. A preliminary question arises as to whether state law actually permits such intrusion. MSDW contends, in reliance on the concurring opinion in *Boyd v. Davis*, 127 Wn.2d 256, 266, 897 P.2d 1239 (1995), and the unanimous *en banc* decision of the Washington Supreme Court in *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003), *recon denied* 2004 Wash. LEXIS 201 (2004), that the "legal error on the face of the award" standard is a relic from an ancient statute repealed by the 1943 Washington Arbitration Act and is no longer good law. Brief of Appellants, pp. 25-27. In opposition, the Brooms contend that the statement relied upon by MSDW from *Malted Mousse* is "pure dicta" and does not clearly overrule prior caselaw regarding the "legal error on the face of the award" standard. Resp. Brief, p. 38.

However, the fact remains that a unanimous Washington Supreme

Court adopted Judge Utter's concurring opinion in *Boyd* and expressly stated that "every case addressing a court's ability to reverse an arbitrator's error in law was based on a statute repealed by the current arbitration act, and that a reviewing court is limited to the statutory grounds." *Malted Mousse*, 150 Wn.2d at 527. Although the Court did not expressly state that it was overruling prior caselaw, this statement reflects a clear intention to do so.[5] Regardless, even if "legal error on the face of the award" survives in the face of *Malted Mousse*, the FAA preempts its application. The Brooms' arguments to the contrary are mistaken.

First, the Brooms contend that the FAA has only one objective, the enforcement of agreements to arbitrate, and that the FAA therefore only has limited preemptive effect, "confined to the issue of enforcing agreements to arbitrate." Resp. Brief., p. 19. This ignores the fact that the FAA has multiple objectives. One is to ensure that arbitration agreements are enforced. A second is to ensure that arbitration awards are enforced, protecting them from unwarranted judicial intrusion and effectuating the parties' intent to obtain a final, binding and efficient resolution of their dispute by an arbitrator and not a court.

Thus, in *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 170 L.Ed. 2d 254

[5]While some Washington cases have mentioned in passing the concept of legal error on the face of the award since *Malted Mousse*, no party apparently argued in those cases against the standard based upon *Malted Mousse* or any other ground. *See, e.g., MacLean Townhomes, LLC v. American States Ins. Co.*, 138 Wn. App 186, 156 P.3d 278, 280

(March 25, 2008), the United States Supreme Court held that sections 9 through 11 of the FAA substantiate "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 265. The Court held that where a party such as MSDW seeks expedited confirmation of an award under section 9 of the FAA, the court must grant confirmation unless one of the exclusive grounds for vacatur set forth in section 10, 9 U.S.C. § 10, is met and there is "no hint of flexibility." *Id.* at 264. This reading prevents "the full-bore legal and evidentiary" appeals that would otherwise render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial process and "bring arbitration theory to grief in post-arbitration process." *Id.* at 265.[6]

The Brooms ignore the FAA's policy to keep courts from interfering with the arbitration process and to effectuate prompt enforcement of arbitration awards. Instead, they incorrectly argue that only state laws that interfere with enforcement of arbitration agreements

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(2007); *Beroth v. Apollo Coll., Inc.*, 135 Wn. App 551, 559, 145 P.3d 386 (2006).

[6]The Court in Hall Street stated that exclusivity of the section 10 standards for vacatur was consistent with the history of the FAA. *Id.* at 266 n.7. The Court noted that Julius Cohen, one of the primary drafters of the FAA, stated to Congress that the grounds for vacatur were limited and that if a ground identified in section 10 was established "then and then only the award may be vacated." *Id.* Cohen went on to state: "There is no authority and no opportunity [under the FAA] for the court, in connection with the award, to inject its own ideas of what the award should have been." Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 before the Senate and House Subcomm. of the Comms. on the Judiciary, 68th Cong., at 36 (1924) ("1924 Hearings").

can be preempted by the FAA. While Supreme Court decisions which have found state laws preempted by the FAA generally have involved laws that interfered with enforcement of arbitration agreements, the Court has never held that FAA preemption is limited to such circumstances.

In fact, *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), and *Preston v. Ferrer*, 128 S. Ct. 978 (2008), support the principle that a state law which offends any fundamental FAA policy can be preempted. In *Volt*, the state law at issue did not affect enforceability of the arbitration agreement. It merely allowed the arbitration to be temporarily delayed until related state court proceedings were concluded. *Id.* at 471. Had FAA preemption been limited to state laws affecting enforceability of the arbitration agreement, the Court would have simply dispensed with the preemption issue on that ground.

But the Court did not analyze preemption in such a grudging manner. Instead, it analyzed the state law to determine if it undermined any of the policies underlying the FAA, not simply the policy in favor of enforcing the arbitration agreement. The Court ruled that state law was preempted "to the extent that it actually conflicts with federal law- that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added)).

The Court stated the issue as whether application of the state law "would undermine the goals and policies of the FAA." *Id.* at 478. FAA preemption is therefore not limited to any one policy of the FAA.

Preston is in accord. In *Preston*, respondent argued that the state law at issue "merely postpones arbitration" until state administrative proceedings are concluded. 128 S. Ct. at 985. The Court found that postponement would likely cause a long delay and was "in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Id.* at 986 (*quoting Moses H. Cone*, 460 U.S. at 22). The Court further stated that "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at least, hinder speedy resolution of the controversy," undermining the primary objective of arbitration which was to achieve streamlined proceedings and expeditious results. *Preston*, 128 S. Ct. at 986. In making these statements, the Court recognized that FAA policies other than the policy in favor of enforcement of the arbitration agreement were relevant to the preemption analysis.[7]

[7] Certain cases cited by the Brooms on this issue either contain loose language where policies other than the policy in favor of enforcing arbitration agreements were not at issue or do not support the conclusion for which they are cited. *See, e.g., Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997) (court faced with a state law that allegedly rendered the arbitration agreement unenforceable and its statements about the extent of preemption were dicta); *St Fleur v. WPI Cable Systems/Mutron*, 879 N.E.2d 27, 31 (Mass. 2008) (citing *Volt*, court recognizes that the FAA preempts any state law that stands as an obstacle to the accomplishment of its full purposes and objectives).

Expedited enforcement of arbitration awards without unwarranted judicial intrusion constitutes one of the FAA's central policies. *Hall Street*, 170 L.Ed. at 265; *1924 Hearings*, p. 26 (courts are given no authority to disturb arbitration awards except on the grounds specified by the FAA). Thus, any state law which makes it easier for a court to intrude in the arbitral process to upset the arbitrator's award or to deny expedited confirmation under section 9 conflicts with the FAA and stands as an obstacle to its full purposes and objectives.

While there are only a few cases which deal with FAA preemption of state laws which make it easier to overturn arbitration awards, those cases support the principle that state statutes which afford less dignity to arbitration awards than the FAA are preempted. In *M & L Power Servs. Inc. v. American Networks Int'l*, 44 F. Supp. 2d 134, 142 (Dist. R.I. 1999), the court held that Rhode Island's "complete irrationality" ground for vacatur, which permitted the reviewing court to weigh the evidence presented to the arbitrator to determine whether it supported his conclusions, was preempted by the FAA. In reliance on *Volt*, the court held: "[T]he FAA only preempts state law to the extent that said state law provides lesser protection for arbitration agreements and awards than does federal law." *Id.* at 141.

Similar reasoning has been adopted by other courts. In *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005) overruled in

different part by *Hall St. Assoc.*, 170 L. Ed. 2d 254 (2008), the court held that, despite the parties' choice of law provision that adopted Puerto Rico law, the broader review standards of that law did not apply in place of the FAA's more narrow standards because "more searching judicial review" conflicts with the "extremely limited judicial review contemplated by the FAA" and its "allocation of powers between the court and the arbitrator." The court explicitly recognized the FAA's policy "favoring final resolution of disputes by arbitration***." *Id.*

In *Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005)) overruled in different part by *Hall St. Assoc.*, 170 L. Ed. 2d 254 (2008), the parties' contract contained a choice-of-law provision adopting Michigan law, which allowed for more searching review of an arbitration award than the FAA. The court ruled this insufficient to abrogate the restrictive FAA vacatur standards. Citing the Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the court stated that the FAA set forth a federal policy favoring arbitral authority and discretion. *Id.* at 711. The court refused to apply the Michigan standard because it "limits the authority of arbitrators by applying greater scrutiny to their decisions." *Id.*[8]

[8]Both *P. R. Telephone* and *Jacada* refused to infer from a mere choice-of-law provision that the parties had adopted a broader standard of review than the FAA allowed. Each case also stated that parties could expand the FAA grounds for review by private agreement, a conclusion that has since been overruled by *Hall Street.*

The teaching of these cases is clear: state laws which permit searching review of arbitration awards undermine important FAA policies. It is thus not surprising that the drafters of the most recent version of the Uniform Arbitration Act (adopted by Washington in the RUAA) stated that "there was strong reason to believe" that state laws allowing for vacatur beyond the limited grounds allowed by section 10 of the FAA would be preempted. Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Arbitration Act*, prefatory note (2000).

On the other hand, state law standards that are the same as the FAA or which are more deferential to the arbitrator's award are not preempted. *See, e.g., In Flexible Mfg. Sys. Pty Ltd. v. Super Prods. Corp.*, 874 F. Supp. 247, 249 (E.D. Wis. 1994), *aff'd.* 86 F.3d 96 (7th Cir. 1996) (court held that FAA and Wisconsin act contain identical deferential language and because "the same values of limited judicial review are protected" by both acts, the FAA did not preempt Wisconsin law); *Penn. Va. Oil & Gas Corp. v. CNX Gas Co., LLC*, 2007 U.S. Dist. LEXIS 12206, *20, *aff'd* 2007 U.S. Dist. LEXIS 18263 (W.D. Va. 2007) (no preemption where "the Virginia law provides greater or equal protection for arbitration awards than the federal law in that it is more restrictive as to the grounds on which a court may vacate an arbitration award").

With the arguable exception of one case, the cases cited by the Brooms regarding preemption of state laws do not involve situations

where the state law made vacatur easier than the FAA. *See, e.g.*, *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771, 775 (Colo. Ct. App. 2000) (Colorado standard more restrictive); *Siegel v. Prudential Ins. Co.*, 67 Cal. App. 4th 1270, 1283-84 (Cal. Ct. App. 1998) (California's standard which precludes "on the merits review of an arbitration award" is not preempted by the FAA because it "furthers the use of arbitration by somewhat more strictly limiting judicial review" and "furthers rather than defeats full effectuation of the federal law's objectives"); *Tim Huey v. Global Boiler & Mechanical*, 649 N.E.2d 1358, 1361-62 (Ill. App. 1995) (state law more deferential than federal law); *Trombetta v. Raymond James Fin. Servs.*, 907 A.2d 550, 569 (Pa. Super. Ct. 2006) (state's standards of review "are on par with those outlined" in section 10 of the FAA).[9]

The Brooms' contention that states are free to open arbitration awards to unlimited attack is wrong. According to the Brooms, states could make arbitration awards subject to *de novo* review regarding the

[9]The only case cited by the Brooms in which the state law arguably made it easier to vacate an arbitration award was *Ovitz v. Shulman*, 133 Cal. App. 4th 830 (Cal. Ct. App. 2005), involving setting aside an award due to arbitrator partiality. However, in that case, the state law was not in conflict with section 10 of the FAA. The statute conflicted with a Ninth Circuit case which set forth a standard, "reasonable impression of partiality," which the court said might very well have been a "judicially created procedural principle independent of the statute" and which, in any event, was not universally accepted. *Id.* at 849. The Court's holding that a state statute defining partiality in a more detailed way did not conflict with the FAA has limited application here where the state law at issue creates a legal error standard which is in direct conflict with section 10 and which has been universally rejected as being inconsistent with the public policies of the FAA.

facts and the law without fear of preemption. But such laws undermine the benefits of arbitration, the authority and independence of the arbitrator and the finality of arbitration awards in derogation of the FAA. They also create a grave risk that the forum in which the case is decided will be outcome determinative. This would offend the principle that "[u]niform national application of a federal substantive law requires, in particular, that state courts not apply procedural rules that would frequently and predictably produce different outcomes" based solely on whether the case is brought in federal or state court. *Siegel*, 67 Cal. App. 4th at 1282-83.[10]

Apart from their argument that the FAA preempts only conflicting state laws that interfere with the enforcement of arbitration agreements, the Brooms' other main argument to avoid application of the FAA is that the parties agreed that Washington law governed the arbitration to the exclusion of the FAA. Resp. Br., pp. 33-35. But this argument is based on a faulty factual assumption. There is no evidence in the record that the parties' arbitration agreement contained an agreement to incorporate Washington law. In fact, no such agreement was entered into. The

[10] The Supreme Court has held that the FAA creates a body of substantive law that must be applied by both federal and state courts when applicable. *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 272 (1995). As such, state laws which make it easier to set aside an arbitration award must be considered substantive law because a contrary holding would cause substantial variations in outcome between state and federal court and would encourage forum-shopping. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428-30 (1996) (grounds for judicial review of a jury's damage award was considered substantive law in order to avoid these untoward results).

Brooms conceded during the arbitration that "the Federal Arbitration Act controls NASD arbitrations" and never argued that Washington arbitration law controlled. CP 162.[11] And when the Brooms moved to vacate the arbitration award, MSDW defended and counterclaimed for confirmation under the FAA. There was no agreement that the arbitration was to be conducted under Washington law to the exclusion of the FAA.[12]

3. There Was No Error of Law on the Face of the Award.

If the Court were to rule that Washington law permits legal error review and is not preempted, MSDW still prevails because there was no legal error committed by the arbitrators on the face of their award. The trial court's blanket ruling that statutes of limitation can never be applied by an arbitrator in Washington is without support and would work a "sea change" in the law of arbitration.

The Brooms' argument to the contrary is based upon a misreading of two cases, *Thorgaard Plumbing & Heating Co. v. King County*, 71

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[11]The first passing reference to Washington law was in the Brooms' second memorandum for reconsideration of the panel's decision to dismiss their claims under applicable statutes of limitation. CP 165. But this pleading also contained the admission that the FAA controlled in NASD arbitrations. CP 162.

[12]The cases cited by the Brooms on agreements to adopt state arbitration law (Resp. Br., p. 34 n.25) involved written agreements to apply state law that were either entered into before any dispute arose or before arbitration was conducted. *See e.g.*, *Volt*, 489 U.S. at 470 (predispute arbitration agreement adopted state law); *Mastrobuono*, 514 U.S. at 53 (arbitration agreement contained choice-of-law provision which was held to be insufficient to adopt state arbitration law); *Ovitz*, 133 Cal. App. 4th at 854 (correspondence relied on by court as evidence of agreement to apply state law occurred shortly after arbitration was compelled and before the arbitration was conducted). No case involved an agreement which was allegedly reached after the arbitration award was rendered.

Wn.2d 126, 426 P.2d 828 (1967), and *City of Auburn v. King County*, 114 Wn.2d 447, 788 P.2d 534 (1990). Contrary to the Brooms' argument, neither case involved the question presented here, namely, whether arbitrators in Washington can dismiss claims based on statutes of limitation. Neither case contains binding law prohibiting arbitrators from applying statutes of limitation such that a Washington arbitration award which permitted dismissal based on statutes of limitation would be deemed erroneous on its face. Moreover, the Brooms' argument regarding these cases is based on language contained therein that arbitrations are not "actions". Resp. Br., pp. 42-45. Yet, this premise was soundly rejected by the Washington Supreme Court, which held that "nothing in the 'plain language' of 'action' prevents us from interpreting it to include arbitration proceedings." *Fire Fighters*, 146 Wn.2d at 41.

Neither *Thorgaard* nor *City of Auburn* can bear the load the Brooms place upon them. In *Thorgaard*, a plumbing contractor obtained an arbitration award against the county. The statute of limitations was not raised as a defense in the arbitration. When the contractor moved to confirm the award, the county contended that the confirmation action was barred because of an inadequate notice of claims. The court held that the plaintiff's motion to confirm was not barred by failure to give notice within 90 days of injury since the county had notice of the claims against it by virtue of the arbitration proceeding. *Id.* at 133. Simply put, nothing

in the opinion touches upon the rights of Washington arbitrators to apply statutes of limitation. *Thorgaard* is a very narrow decision that was limited to its facts by the Washington Supreme Court in *Fire Fighters*. 146 Wn.2d at 40.

Similarly, in *City of Auburn*, the court was not confronted with whether arbitrators can dismiss claims in arbitration based on statutes of limitation. Rather, the defendant tried to enjoin the arbitration from going forward on multiple grounds, including timeliness. The court, without analysis and in one sentence, merely affirmed the trial court's decision that Washington's two-year catchall statute of limitation, RCW 4.16.130, did not apply to bar a motion to compel arbitration. 114 Wn.2d at 450. To the extent this holding relies upon the notion that arbitration can never be considered an "action" under Washington law, it has been negated by *Fire Fighters*.[13]

In the context of this case, the arbitrators surely acted within their authority in deciding that certain of the Brooms' claims were barred by statutes of limitation. There is no dispute that the parties agreed to arbitrate under the NASD Code of Arbitration. NASD Code of

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[13] The Brooms concede that, under *Fire Fighters*, the question of whether arbitration can be deemed an "action" for purposes of Washington law depends on the legal context in which the question arises. Resp. Brief, p. 46. By making this concession, the Brooms undermine their contentions that statutes of limitation can never apply in arbitration. They also undermine this contention by seeking attorney fees under Washington statutes which apply only to "actions" or lawsuits. CP 27, 30. They make no effort to explain why arbitration is deemed an "action" for purposes of their claim for attorney fees but is

Arbitration Procedure § 10304 (in effect when the Brooms commenced their arbitration) sets forth a general six-year statute of limitations, but further states that: "This Rule does not extend applicable statutes of limitation***." The parties thus incorporated Washington's applicable statutes of limitations in their agreement to arbitrate. It was up to the arbitration panel to decide what the term "applicable" meant in this context. The arbitration panel correctly determined that the Washington statutes of limitation that governed the Brooms' claims were "applicable."

Under these circumstances, there is no support for the notion that the Panel committed error "on the face of the award." If the arbitration panel could have reached its decision in any way that was not *per se* contrary to law, the arbitration award must stand. The "award" for purposes of judicial review is that portion of the arbitrator's decision that states the outcome. *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 766 P.2d 1146 (1989).[14] Here, the Award section simply states, in relevant part, that the Brooms' "claims are dismissed without prejudice." CP 11. There is certainly no error on the face of that statement.

However, if the Court was to scrutinize the entire six-page decision of the Panel to review the statement that the Brooms' "claims were barred

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simultaneously not an "action" for purposes of statutes of limitation.

[14]*See also Expert Drywall v. Ellis-Don Constr.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997), *rev den.*, 134 Wn.2d 1011 (1998) (arbitrator's reasons for the award are not part of the award for purposes of review).

by applicable statutes of limitation," it can still find no legal error without going beyond the face of the award because it would be forced to engage in an impermissible "analysis of the contract as well as statutory law" to establish legal error. *See Morrell v. Wedbush Morgan Sec., Inc.*, 2008 Wash. App. LEXIS 592, *21 (March 11, 2008) (reviewing court may not analyze underlying contract or statutory provisions because this involves going outside the face of the award).

To argue error, the Brooms necessarily must rely on their interpretation of the parties' agreement to arbitrate, rejecting a valid and reasonable interpretation that the parties expressly incorporated applicable Washington statutes of limitation into their agreement by agreeing to abide by NASD Code of Procedure 10304. *See* CP 519-21. To reject this interpretation necessarily requires the trial court to go beyond the face of the award and construe the parties' contract and the meaning of the phrase "applicable statutes of limitation," which it may not do. Further, it is plausible from the face of the decision that the Panel decided that the Brooms had waived their argument that Washington statutes of limitation did not apply to claims in arbitration by not raising it until after the Panel had dismissed their claims.[15]

[15]See CP 10-11 (panel referred to the Brooms' two separate motions to reconsider the dismissal on statue of limitations grounds and indicated that it had denied both motions). The panels' decision could also have been based upon a conclusion that motions for reconsideration are not permitted in arbitration proceedings. CP 174-175.

It is also conceivable that the Panel considered the authorities cited by the parties after the Brooms argued for the first time that statutes of limitation were inapplicable in Washington arbitrations and interpreted *Fire Fighters* to mean that, in the context of this case, the term "action" did include NASD arbitration so that statutes of limitation did apply. Such a conclusion would not constitute facial error. *See Lent's Inc. v. Santa Fe Eng'rs, Inc.*, 29 Wn. App. 257, 266, 628 P.2d 488 (1981) (trial court did not err in refusing to vacate where the paragraph of which the party wishing to vacate complains is subject to varying interpretations).[16]

The bottom line is that there is no blanket rule in Washington that statutes of limitation do not apply in arbitration because there is nothing in the plain language of the word "action" that prevents a court "from interpreting it to include arbitration." *Fire Fighters*, 146 Wn.2d at 41. The arbitration panel's conclusion that Washington's statute of limitations

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[16] Cases from other states cited by the Brooms do not undermine the conclusion that the arbitration panel herein properly decided that Washington's statutes of limitation were "applicable" within the meaning of the parties' agreement to arbitrate under NASD rules. Resp. Br. 43 n.31. A unifying principle in many of these cases is not that statutes of limitation generally do not apply in arbitrations. It is that the arbitrator decides whether specific statutes of limitation apply to claims in arbitration. For example, in *Lewiston Firefighters Ass'n .v. Lewiston*, 354 A.2d 154, 167 (Me. 1976), the court commented, "the final disposition of such questions [including whether a six year statute of limitation applies] should be left to the arbitrator." In *NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168 (S.D. Ohio 1993), *aff'd*, 43 F.3d 1076 (6th Cir. 1993), *cert. den.*, 516 U.S. 906 (1995), the court affirmed the arbitrator's decision whether state statutes of limitation applied. The court stated, "[E]ven if the Arbitrator had been wrong, this Court would have no authority to review the merits of his decision on this issue." *Id.* at 173. *See also Office of Supply, Government of Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 380 (2d Cir. 1972) ("Thereafter it is for the arbitrators, not the court, to decide whether a claim is time-barred by their agreement.").

were "applicable" could have been based (1) on its interpretation of the parties' arbitration agreement (which incorporated "applicable" statutes of limitation); (2) the law of the State of Washington (including *Fire Fighters*); or (3) a decision that the Brooms had waived any contention that Washington's statute of limitations did not apply. Under either alternative, there was no "legal error on the face of the award."

D. CONCLUSION

This Court should reverse the trial court and confirm the properly rendered arbitration award. The trial court had no authority to second-guess the arbitrator under either the FAA or Washington law. And even if the court had such authority, there was no error on the face of the award.

Respectfully submitted this 14th day of April, 2008.

SCHWABE, WILLIAMSON & WYATT, P.C.

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CERTIFICATE OF FILING

I HEREBY CERTIFY that on April 14, 2008, I filed the foregoing **REPLY BRIEF OF APPELLANTS** by mailing the original and one copy by regular United States mail with postage prepaid to the following address:

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2008, I caused to be served the foregoing **REPLY BRIEF OF APPELLANTS** Morgan Stanley DW Inc. and Kimberly Anne Blindheim on the following by United States first-class mail with postage prepaid:

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